

The EU and Poland: Giving up on the Rule of Law?

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A little more than a week ago, Jean-Claude Juncker gave up on the rule of law.

Speaking in an interview with Belgian newspaper [Le Soir](#) (english summary [here](#)), the European Commission President suggested that there was nothing the European Union could do to halt the slide toward authoritarianism in EU Member States such as Hungary and more recently, Poland:

'Things have slipped in a number of countries and we do not know where they would take us. In the European Treaties, Article 7 provides possible sanctions against countries which would go awry with respect to the EU's universal principles. We say that it is a 'nuclear option'. But there are already some Member States which are saying that they will refuse to use them. This a priori refusal cancels de facto Article 7. I note this with sadness and disappointment. I hope that the peoples will not give free rein to those who will in the end harm them.'

Juncker's remarks came just as all eyes were on the European Commission, after Poland had angrily rejected the Commission's insistence that the Polish government back down from its attacks on the Constitutional Court and follow its decisions (for our previous posts and links to key documents, see [here](#) and [here](#)). We are now waiting for the Commission's assessment of the (unpublished) response it received from the Polish government following the expiry of the deadline (i.e. 27 October 2016) to implement the Commission's Rule of Law Recommendation of 27 July 2016. It is worth noting that the 2014 Commission Communication on the Rule of Law Framework does not compel the Commission to act within a particular timeframe at this stage. Instead, it provides that the Commission ought to 'assess the possibility of activating one of the mechanisms set out in Article 7 TEU' in the situation where 'there is no satisfactory follow-up to the recommendation by the Member State concerned within the time limit set'.

In light of the overwhelming evidence of a deliberate governmental strategy of systematically undermining all checks and balances in Poland, and the uncooperative if not intemperate and uncooperative behaviour of Polish authorities since January, we believe that the Commission has to be resolute to enforce the treaties and ought to trigger Article 7 TEU. Any other course of action would make the EU look completely spineless and even more worryingly, endanger the whole EU legal framework which, to quote the Court of Justice, 'is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU' ([Opinion 2/13](#), para. 168).

Considering the above, Juncker's abdication of responsibility came at a particularly inopportune time. It was also done in the most unfortunate manner. Juncker's assessment seems to have been thrown out as a casual comment, undermining the European Commission's determination on this point until now. Indeed, Juncker had delegated the issue to the Commission's first vice-president, Frans Timmermans, who has shown professional seriousness in handling the matter so far. But Timmermans had not yet responded officially to Poland and has been presumably consulting about what to do next. With this comment, Juncker seemed to pull the rug out from under him.

Juncker also seems to have done this without much forethought and prior consultation of the College of Commissioners. However, in the previous stages of the rule of law mechanism, College of Commissioners meetings discussed the response to Poland at every stage. But there was no announcement that the situation in Poland as regards the rule of law had been on a College agenda yet. If this is indeed the case, in expressing himself as he did via a newspaper interview, Juncker might have fatally undermined the Commission's ability to

do anything else.

If Article 7 TEU is to be invoked – and Article 7(1) TEU would be a logical place to begin – then the Commission can propose to start the process. But then two-thirds of MEPs (see Article 354 TFEU which provides that for the purposes of Article 7, the European Parliament ‘shall act by a two-thirds majority of the votes cast, representing the majority of its component Members’) and four-fifths of the Council would need to agree that there is a risk of a serious breach by Poland of the values laid down in Article 2 TEU. Both are high hurdles, and yet it would take fully five member states to block action at the Council. If Juncker says that this is impossible before the case is even made and before the Council is given the opportunity to hear Poland and eventually address recommendations to it, then how can he seriously make the case later that it could in fact be done? Political agreement like that would require leadership, and Juncker would be a logical leader of the campaign. But he seems to have given up without even attempting to bring anyone else along – or even taking the pulse of his colleagues at the Commission.

But triggering Article 7(1) is not however the sole prerogative of the Commission. The Parliament and/or a group of Member States (one third of them would be required) could invoke Article 7(1) now, but surely it would help them if there were a final set of factual findings from the Commission that Poland has failed to comply with its rule of law recommendations despite being given every opportunity. But can the Commission make such a finding now that its President has clearly given up and admitted that a slide into authoritarianism is not really his business? Juncker’s statement seems designed to throw a spanner into the rule of law works. It is, at a minimum, not helpful.

Juncker’s response reveals how little the Commission feels that it bears responsibility for enforcing the European treaties. If the Commission cannot enforce basic EU values in the face of a meltdown of constitutional government in *two* of its Member States, then the Commission is violating its own solemn obligation under the treaties and calling the rule of law into further question. It is important in our opinion to stress that the Commission’s job is not to uphold the rule of law only when its President is of the view, rightly or wrongly, that a number of national governments may not support the Commission’s activation of Article 7 against Poland. Article 17 TEU provides without qualifications that the Commission ‘shall ensure the application of the Treaties’ and does not contain between brackets an exception whereby its role as Guardian of the Treaties is dependent upon the obvious acceptance of its efforts in all quarters. Indeed, it is precisely when the values of the EU are called into question that the Commission has the obligation to make the case for those values.

It is time for the Commission to squarely put the onus on the national governments, too many of which have hidden behind the Commission rather than directly confront and isolate Viktor Orbán or Beata Szydło. Not triggering Article 7(1) TEU, considering the body of evidence available against Poland, would seriously damage the authority of the Commission as the Guardian of the Treaties. In fact, it may have been the Commission’s reluctance to act in the case of Hungary that encouraged Poland to go down the same path. (For overwhelming evidence that the Hungarian government under Orbán has presided over a systematic dismantlement of democratic and rule of law safeguards in Hungary since 2010, see this recent [report by FIDH](#))

As noted in a previous [blog post](#), ‘this is a decisive issue for the whole EU as these systemic violations of EU values not only affect the citizens of the relevant Member State, they also affect EU citizens residing in these illiberal regimes as well as all EU citizens through Hungary and Poland’s participation in the EU’s decision-making process and the adoption of norms that bind all in the EU.’

Many are asking what the EU stands for after the UK’s vote to leave. Facing the Euro-crisis (which has witnessed the steady grinding down of Greece), the refugee crisis (whose temporary pause is marked by a dirty deal with Turkey), the neighbourhood crisis (in which neither Ukraine nor the Middle East nor Northern Africa are peaceful or secure) and the uncertainty of life after Brexit, one might imagine that European institutions would at least want to indicate that they stand for some good thing. One might have hoped that the EU could at least promise and defend the rule of law within its own borders. But this past weekend, the President of the European Commission threw in the towel.

Since Juncker seemingly gave up on the rule of law, the need for a strong defence of liberal values has become

only clearer. Populism claimed its latest victim in the United States shortly after Juncker's interview. With the oncoming Trump presidency in the US, the EU is under even more pressure to remain a beacon of liberal values if these values are now to have a determined and prominent institutional home. If EU institutions do not act in the face of a rude rejection of liberal values in Poland, having already failed to act swiftly enough to prevent autocratic consolidation in Hungary, it will show that it is not capable of fulfilling its leadership role in the world.

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